

Tan Jeh Lee v Alliance Bank Malaysia Bhd

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HIGH COURT (KOTA KINABALU) — CASE NO KK-22-170 OF 2011
CHEW SOO HO J
1 FEBRUARY 2013

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Civil Procedure — Striking out — Affidavits — Striking out of contents of affidavits and of action — Whether matters raised in affidavits scandalous, irrelevant or otherwise oppressive — Whether plain and obvious case for action to struck out — Rules of the High Court 1980 O 41 r 6, O 18 r 19(1)(b), (c) & (d)

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Civil Procedure — Striking out — Writ and statement of claim — Whether scandalous, frivolous or vexatious — Whether prejudice, embarrassed or delayed fair trial of action — Rules of the High Court 1980 O 18 r 19(1)(b), (c), (d) & O 92 r 4

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The defendant filed two applications for striking out in the instant case — one ('encl 32'), made pursuant to O 41 r 6 and O 92 r 4 of the Rules of the High Court 1980 ('RHC'), was to strike out certain paragraphs from two of the plaintiff's affidavits filed in the action while the other ('encl 20'), made pursuant to O 18 r 19(1)(b)–(d) and O 92 r 4 of the RHC, was to strike out, inter alia, the plaintiff's writ of summons and statement of claim on the ground the claim was scandalous, frivolous or vexatious; that it prejudiced, embarrassed or delayed the fair trial of the action; or that it was an abuse of process of the court. With respect to encl 32, the matters sought to be struck out of the plaintiff's affidavits for being scandalous, irrelevant or otherwise oppressive were allegations that the defendant, its solicitor and the plaintiff's solicitor at the material time had conspired to act to the plaintiff's detriment simply because the defendant's counsel had stood in for the plaintiff's counsel on a particular date to receive a ruling from the court. The plaintiff alleged that such action was a breach of r 5(b)(i) of the Advocates (Practice and Etiquette) Rules 1988.

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Held, allowing encl 32 and dismissing encl 20:

- (1) The mere fact that a counsel who stood in for another counsel in a case to receive a decision or ruling of the court was a common practice in court which did not create any conspiracy by that mere fact of standing in, especially when such standing in or mentioning on behalf was done on the opponent counsel's request or with full knowledge and consent of that counsel (see para 5).

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- A (2) There was no evidence to substantiate any conspiracy or 'nefarious purpose' as alleged by the plaintiff against either or both solicitors. It was scandalous for the plaintiff to make such allegations without cogent evidence or basis. In any event, the court was not the proper forum to deal with such complaints, which ought to be referred to the governing professional body on the discipline of its members, and the allegations were irrelevant and did not relate to the cause of action in the case (see paras 5–6).
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- C (3) As there was a need to conduct a minute examination of all the relevant documents, accounts and facts to determine whether the plaintiff had a cause of action or whether the claim was sustainable or not, it was not a plain and obvious case for the summary process of striking out of the claim to be applied in this case (see para 17).

[Bahasa Malaysia summary]

- D Defendan memfailkan dua permohonan untuk pembatalan di dalam kes ini — satu ('lampiran 32'), dibuat berikutan A 41 k 6 dan A 92 k 4 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'), adalah untuk membatalkan perenggan-perenggan tertentu daripada dua affidavit plaintif yang difailkan di dalam tindakan sementara yang lagi satu ('lampiran 20'), yang dibuat berikutan A 18 k 19(1)(b)–(d) dan A 92 k 4 KMT, adalah untuk membatalkan, antara lain, writ saman dan pernyataan tuntutan plaintif atas alasan tuntutan adalah bersifat skandal, remeh atau menyusahkan; yang ia prejudis, memalukan atau melambatkan perbicaraan adil tindakan tersebut; atau ia adalah penyalahgunaan proses mahkamah. Berkenaan lampiran 32, perkara yang dipohon untuk dibatalkan daripada affidavit-afidavit plaintif kerana bersifat skandal, tidak relevan atau sebaliknya menindas adalah dakwaan-dakwaan yang defendan, peguamnya dan peguam plaintif pada masa material berkomplot untuk bertindak menjejaskan plaintif hanya kerana
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- G peguam defendan telah mengambil tempat peguam plaintif pada tarikh tertentu untuk menerima perintah daripada mahkamah. Plaintif mendakwa bahawa tindakan sedemikian adalah kemungkiran k 5(b)(i) Peraturan-Peraturan Peguambela (Amalan dan Etika) 1988.
- H **Diputuskan**, membenarkan lampiran 32 dan menolak lampiran 20:
- I (1) Fakta semata-mata bahawa peguam yang mengambil tempat untuk peguam lain di dalam kes untuk menerima perintah mahkamah adalah amalan biasa di mahkamah yang tidak membentuk apa-apa pengkomplotan dengan hanya fakta mengambil tempat, terutamanya apabila pengambilan tempat sedemikian atau menyebut bagi pihak dibuat atas permintaan peguam penentang atau dengan pengetahuan dan izin peguam tersebut (lihat perenggan 5).
- (2) Tidak terdapat keterangan untuk mengesahkan apa-apa pengkomplotan

atau 'nefarious purpose' seperti yang didakwa oleh plaintif terhadap sesama atau kedua-dua peguam. Ia adalah bersifat skandal untuk plaintif membuat dakwaan-dakwaan sedemikian tanpa keterangan jelas atau berasas. Walau bagaimanapun, mahkamah bukan forum yang betul untuk mendengar aduan sedemikian, yang patut dirujuk kepada badan profesional yang mengawal disiplin ahli-ahlinya, dan dakwaan-dakwaan tersebut tidak relevan dan tidak berkaitan kepada kausa tindakan dalam kes (lihat perenggan 5–6).

- (3) Memandangkan terdapat keperluan untuk menjalankan pemeriksaan terhadap kesemua dokumen relevan, akaun-akaun dan fakta untuk menentukan sama ada plaintif mempunyai kausa tindakan atau sama ada tuntutan tersebut boleh dikekalkan atau tidak, ia bukan kes yang jelas dan nyata untuk proses ringkas pembatalan tuntutan untuk digunapakai di dalam kes ini (lihat perenggan 17).]

Notes

For cases on affidavits, see 2(3) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 7980–7981.

For cases on writ and statement of claim, see 2(3) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 8171–8176.

Cases referred to

Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd [1993] 3 MLJ 36, SC (refd)

Lee Nyan Choi v Voon Noon [1979] 2 MLJ 28, FC (refd)

Roslan bin Abdullah v New Zealand Insurance Co Ltd [1981] 2 MLJ 324; [1981] 1 LNS 41, FC (refd)

Wenlock v Moloney and Ors [1965] 2 All ER 871; [1965] 1 WLR 1238, CA (refd)

Legislation referred to

Advocates (Practice and Etiquette) Rules 1988 r 5(b)(i)

Power of Attorney Act 1949

Rules of Court 2012

Rules of the High Court 1980 O 18 r 19(1), O 18 r 19(1)(b), (c), (d), O 41 rr 4, 6, O 92 r 4

Plaintiff in person.

Mary Anne Poh (Alex Pang & Co) for the defendant.

Chew Soo Ho J:

DECISION ENCLS 20 AND 32

[1] These two enclosures filed by the defendant herein are:

- (a) to strike out para 4 of the plaintiff's affidavit in opposition affirmed on

- A 30 June 2012 and paras 7, 8, 8(d)–(h), (j), (k)–(m) and 9 of the plaintiff’s affidavit in opposition (2) affirmed on 24 July 2012, (encl 32);
- (b) to strike out the whole of the plaintiff’s writ of summons and statement of claim dated 28 July 2011 against the defendant and the whole of the plaintiff’s further and better particulars forwarded to the defendant’s solicitors on 9 October 2012, (encl 20); and
- B (c) costs.

C [2] Enclosure 20 application is made pursuant to O 18 r 19(1)(b), (c) and (d) and O 92 r 4 of the Rules of the High Court 1980 (‘RHC’) while encl 32 is an application pursuant to O 41 r 4 and O 92 r 4 of the RHC. I shall deal with encl 32 before encl 20.

D FINDINGS OF COURT

Enclosure 32

- E [3] Basically, para 4 of the plaintiff’s affidavit in opposition sworn on 30 June 2012 and paras 7, 8, 8(d)–(h), (j), (k)–(m) and 9 of the plaintiff’s affidavit in opposition (2) affirmed on 24 July 2012 deposed allegations of breach of the r 5(b)(i) of the Advocates (Practice and Etiquette) Rules 1988 against the solicitor for the defendant standing in for the plaintiff’s then solicitor on the date of a ruling by the court on 15 June 2012 while allegations in paras 7, 8,
- F 8(d)–(h), (j), (k)–(m) and 9 in the plaintiff’s affidavit in opposition (2) deposed that the defendant, the defendant’s solicitor and the plaintiff’s then solicitor were in conspiracy presumably acting as such to the plaintiff’s detriment when they were playing a ‘supplementary and complimentary role to each other’ arising from the defendant’s solicitor standing in for the plaintiff’s solicitor on
- G 15 June 2012 to receive the ruling from the court.

[4] Order 41 r 6 of the RHC provides that:

- H The Court may order to be struck out of any affidavit any matter which is scandalous, irrelevant or otherwise oppressive.

I [5] From the facts, I find the mere fact that a solicitor who stands in for another solicitor in a case is a common practice in court which does not create any conspiracy by that mere fact of standing in especially when such standing in or mentioning on behalf of another solicitor is done upon request by the opponent’s counsel or with the full knowledge and consent of that counsel. There is nothing wrong for a solicitor to stand in to receive a decision or a ruling of the court. From the facts before the court, I do not find any evidence or fact to substantiate any conspiracy or ‘nefarious purpose’ as alleged by the

plaintiff against either or both solicitors. It is thus scandalous for the plaintiff to make such an allegation without any cogent evidence or facts or basis.

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[6] In any event, any complaint or allegation of misconduct against an advocate and solicitor ought to be referred to the governing professional body on the discipline of its members and it is not to this court at this stage of the proceeding. The plaintiff has already discharged her said solicitor and elected to act in person now. Since this court is not the proper forum, the allegations are thus irrelevant as they do not relate to the cause of action in this case.

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[7] For the foregoing reasons. I hold that the aforesaid allegations as contained in the respective paragraphs in the plaintiff's affidavit in opposition and affidavit in opposition (2) are scandalous and irrelevant under O 41 r 6. Therefore I allow encl 32 with costs in the cause.

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Enclosure 20

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[8] The defendant applies for the plaintiff's writ to be struck out under O 18 r 9(1)(b)–(d) of the RHC ie on the ground that it is scandalous, frivolous or vexatious, that it may prejudice, embarrass or delay the fair trial of the action; or that it is an abuse of the process of the court or on the inherent jurisdiction of the court. For the court to exercise its power under any of the four limbs of O 18 r 19(1) of the RHC (now Rules of Court 2012), the law is clear that it is only in plain and obvious cases that recourse to this summary process is entertained and that it is also only adopted in cases where on the face of it, the claim or the defence is obviously unsustainable; see *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36 (SC) and *Roslan bin Abdullah v New Zealand Insurance Co Ltd* [1981] 2 MLJ 324; [1981] 1 LNS 41 (FC). It cannot be exercised by a minute examination of the document and facts of the case in order to see whether the party has a cause of action or a defence; see *Wenlock v Moloney and Ors* [1965] 2 All ER 871; [1965] 1 WLR 1238 (CA).

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[9] The brief facts of the case show that the defendant granted an overdraft facility ('OD') of RM120,000 to the plaintiff trading as JSM Consultancy on 24 May 1984 with the terms and conditions that the plaintiff placed a time deposit of RM130,000 under lien to the defendant as security for the OD which the plaintiff did on 16 May 1984. The time deposit carried an interest of 9%pa and renewable annually if the OD was still subsisting at the due date.

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[10] On 15 November 1984, the defendant granted a temporary OD of RM19,000 to the plaintiff repayable within one month from the letter of offer of even date or upon receipt of payment from JKR of the plaintiff's subcontract whichever is earlier.

- A** [11] When the OD and temporary OD were in default/excess, the plaintiff via a letter dated 21 May 1985 requested the defendant to uplift the time deposit to settle the OD and temporary OD and it was so uplifted on 27 May 1985. However, the time deposit together with interest were insufficient to pay the outstanding owing to the defendant with a balance of RM7,800 as at 27 May 1985.
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- [12] On 9 January 1989, the defendant had obtained a judgment against the plaintiff for the outstanding balance of RM10,209.52. Bankruptcy proceeding was instituted upon the plaintiff's failure to pay the judgment debt. Adjudication order ('AO') and receiving order ('RO') were granted against the plaintiff on 28 July 1992. The proof of debt relating to this OD and temporary OD showed the sum of RM13,668.74 as in the notice of admission of proof dated 30 March 2009 while the proof of debt in relation to another loan to the plaintiff trading under JS Consultancy vide another notice of admission of proof dated 30 March 2009 is RM27,513.85.
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- [13] On 23 February 2010, the plaintiff wrote to offer RM23,000 to discharge the liabilities in the aforesaid JSM Consultancy and JS Consultancy accounts for which the defendant had accepted on 23 April 2010.
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[14] On 5 August 2010, upon the payment of the settlement sum above, AO and RO were annulled.

- F** [15] On 14 July 2011, the plaintiff through her solicitors had demanded sum of interest of RM9,486,349.24 and RM5,048,8591.35 from the defendant as well as a claim for an accrued loss totally RM1,418,929.18 as at 13 July 2011 arising out of a lapse of 11 days in the remittance of the sum of RM130,000 which the defendant had denied vide its solicitor's letter dated 20 July 2011. Hence this writ was instituted against the defendant.
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- [16] The defendant vide affidavit in support (encl 21) from paras 35–81 had deposed and averred the alleged facts in answering to the plaintiff's claims as pleaded in the statement of claim with the detail calculations to show that the plaintiff's calculations were wrong. The plaintiff vide her affidavit titled reply to the defendant's written submission in reply dated 4 October 2012 submitted that the plaintiff's statement of claim is consistent with the exhibits marked 'R2' to 'R8', all of which were the documents produced by the defendant which plaintiff had produced in her affidavit in opposition sworn on 30 June 2012.
- H**
- I** The plaintiff also contended that since the power of attorney Act 1949 is not applicable in Sabah, all affidavits affirmed and application filed by the defendant through its attorney under a power of attorney are null and void as she had raised in her written submission. The defendant has submitted on this point of law vide its written submission in reply dated 4 October 2012.

[17] From the facts and submissions together with the numerous affidavits filed by the plaintiff, I am of the view that since the parties are at variance as to the facts and figures in the way they perceived and/or from the various documents that parties derived their facts and findings relating to claims of interest and delay in the remittance resulting in loss as alleged by the plaintiff, I am of the view that there is a need to conduct a minute examination of all the relevant documents and accounts and facts in order to determine whether the plaintiff has a cause of action or that the plaintiff's claim is sustainable or unsustainable. Any loss must be proved by evidence and not mere assertion. It is thus inappropriate for this summary process to be applied; see *Wenlock v Moloneyas* also cited in *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd*. As observed by His Lordship Lee Hun Hee CJ (Borneo) in *Lee Nyan Choi v Voon Noon* [1979] 2 MLJ 28 at p 29:

The power to dismiss an action summarily without permitting a party to trial is a drastic power and should be exercised with utmost caution.

The power of summary procedure should only be resorted to on plain and obvious cases.

[18] When it calls for a detail examination of all relevant documents to determine the provability of a claim or a cause of action, it is not a plain and obvious case for O 18 r 19(1) of the RHC to be invoked. All the most, the court should not exercise its inherent jurisdiction under O 92 r 4 of the RHC where justice of the case would be to allow parties to be heard of the merit of the case. Any legal issues could also be determined in the trial.

[19] In the circumstances, I would dismiss encl 20 with costs of RM5,000 as offered by the defendant's solicitor.

Enclosure 32 allowed and encl 20 dismissed.

Reported by Ashok Kumar

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